Supreme Court, U.S.
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No. 94-908

In the Supreme Court of the United States

OCTOBER TERM, 1994

J. R. SIMPLOT COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the finding of the National Labor Relations Board that there was a sufficient continuity of operations and of employees between petitioner's old plant and its new plant to warrant requiring petitioner to continue to recognize the union which represented the employees at the old plant as the representative of the workforce at the new plant.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is unpublished, but the decision is noted at 33 F.3d 58 (Table). The decision and order of the National Labor Relations Board (Pet. App. 6-8), including the decision of the administrative law judge (Pet. App. 9-84), is reported at 311 N.L.R.B. 572.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1994. The petition for a writ of certiorari was filed on November 17, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates food processing plants and related trucking businesses in several States, including the State of Washington. Pet. App. 23. In May 1989, petitioner was operating two plants in Washington: One, located in Wenatchee, was a year-round facility, which "prime packed" and "repacked" vegetables; the other, located in Ferndale, was a seasonal facility, which "prime packed" vegetables. *Id.* at 24.[1] At the Wenatchee plant, petitioner employed a core group of production and maintenance workers on a year-round basis, and hired additional seasonal employees for the harvest season, which generally ran from June 1 through September 30. *Id.* at 24, 26-27. At the Ferndale plant, petitioner maintained only a seasonal workforce, as its operations there were limited to the harvest season. *Id.* at 30 n.34, 35. Petitioner had historically recognized Local 760 of the International Brotherhood of Teamsters (the Union) as the collective-bargaining representative of the Wenatchee employees, and had executed a labor contract with the Union effective through April 30, 1990. *Id.* at 10, 24. The Ferndale employees were represented by a different Teamsters local. *Ibid.*

In May 1989, petitioner decided that, beginning with the 1990 harvest season, its Wenatchee and Ferndale operations would be centralized at a new facility, to be built in Quincy, Washington, some 30 miles from

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[1] "Prime packing" involves processing, freezing, and warehousing fresh produce in bulk storage containers during the harvest season. "Repacking" involves removing "prime packed" produce from bulk warehouse storage and repackaging it for shipment in customer-specified containers. "Repacking" operations are performed primarily outside of the harvest season. Pet. App. 24-26.

Wenatchee and 210 miles from Ferndale. Pet. App. 8, 19 n.17, 24, 28. Petitioner closed the Ferndale plant at the end of the 1989 harvest season. *Id.* at 35. Then, in January 1990, having determined that a substantial number of Wenatchee employees (the only nearby, large-scale source of experienced personnel) would transfer to the Quincy plant, petitioner informed the Wenatchee employees that, when the Quincy plant opened for business, it would be run on a non-union basis. *Id.* at 38, 40. Petitioner thereupon unilaterally established pay classifications and benefit programs for the Quincy plant without bargaining with the Union. *Id.* at 18, 38. On February 13, 1990, petitioner refused the Union's request for recognition as the representative of the employees to be hired at the Quincy plant. *Id.* at 37 & n.42.

In mid-April 1990, petitioner recruited Wenatchee employees to fill the 150 to 200 year-round positions that petitioner projected it would need to staff the Quincy facility. Pet. App. 40-41. Of the Wenatchee plant's approximately 177 year-round employees, between 150 and 160 applied for work at the Quincy plant, virtually all of whom were hired. *Id.* at 42-43. Because of the distance between the Ferndale plant and the Quincy plant (210 miles), petitioner did not regard the pool of former Ferndale employees as a likely source of personnel for the Quincy plant, and, in fact, former Ferndale employees ultimately constituted an insubstantial percentage of the Quincy workforce. *Id.* at 41 n.46, 69 n.82.

Petitioner closed the Wenatchee plant on April 30, 1990, the date on which the labor contract covering that facility expired. Pet. App. 18. Petitioner commenced operations at the Quincy plant on or about May 1, gradually phasing in former Wenatchee employees, along

with new hires. *Id.* at 51. Former Wenatchee employees at all times constituted a majority of the employees at the Quincy plant, except during the peak of the harvest season, which lasted from August 1 to September 30. *Id.* at 51-52, 70.[2] After the peak of the harvest season, the Quincy workforce shrunk to a core complement of 170 to 180 year-round employees, the majority of whom had transferred from Wenatchee. *Id.* at 52.

2. The General Counsel of the National Labor Relations Board (Board) issued an unfair labor practice complaint against petitioner. He alleged, *inter alia*, that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(5) and (1), by refusing to recognize the Union as the bargaining representative of the Quincy employees, and by refusing to apply the terms of the expired Wenatchee labor contract to cover the Quincy plant. Pet. App. 12 & n.8.

a. After a hearing, the administrative law judge (ALJ) found that petitioner had violated the Act as alleged. Pet. App. 77. Initially, the ALJ noted that petitioner and the General Counsel were in disagreement as to the proper "label[]" to describe the relationship among the plants. *Id.* at 63. But, whether the Quincy plant was

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[2] On May 1, 1990, the Quincy workforce consisted of 55 Wenatchee transferees and 12 new hires (Pet. App. 45); by May 15, the workforce had grown to 113 employees, 81 of whom were Wenatchee transferees, and 32 of whom were new hires. *Ibid.* On May 25, petitioner held a "grand opening" ceremony at the Quincy plant; six days later, on May 31, the workforce consisted of 139 employees, 84 of whom were Wenatchee transferees, and 55 of whom were new hires. *Id.* at 45, 47. During the peak of the harvest season (August 1 through September 30) the number of Wenatchee transferees fluctuated from between 33 and 40% of the Quincy workforce, the majority of the workforce then temporarily consisting of seasonal new hires. *Id.* at 51-52 & nn.63-64.

regarded as "a product of a merger or consolidation" of Ferndale and Wenatchee (as urged by petitioner) or as "merely a relocated version of Wenatchee" (as urged by the General Counsel), the ALJ concluded that such labels were "useful only insofar as they illuminate the more basic inquiry," *ibid.* (internal quotation marks omitted), set forth by the Board in *Harte & Co.*, 278 N.L.R.B. 947 (1986), of determining "whether or not there exists 'sufficient continuity' between the old and new operations," so as to make it appropriate "to extend the old bargaining relationship to the new location." Pet. App. 64.[3]

Applying that test, the ALJ found that "Quincy is substantially the same from an operational standpoint as Wenatchee." Pet. App. 70. The ALJ explained that "Quincy's repack operation is, essentially, the Wenatchee repack operation 'relocated'"[4]; that "[t]he

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[3] In *Harte & Co.*, 278 N.L.R.B. 947 (1986), the employer relocated its operation to a new facility, and it transferred a sufficient number of its employees, who were covered by a union contract, to the new facility such that they comprised 40% of the workforce there; the remainder of the employees at the new facility were not represented by a union. *Id.* at 947-948. The Board held that the employer lawfully applied the union contract to its entire workforce, explaining: "[A]n existing contract will remain in effect after a relocation if the operations at the new facility are substantially the same as those at the old and if transferees from the old plant constitute a substantial percentage—approximately 40 percent or more—of the new plant employee complement." *Id.* at 948.

[4] The ALJ pointed out that: (1) although the Quincy plant was capable of processing a larger volume of produce than the Wenatchee plant, petitioner continued to prime pack and repack principally the same varieties of vegetables at both facilities (Pet. App. 53-54, 63); (2) to the extent that the Quincy plant handled different vegetable varieties, they did not require the creation of

employees used at Quincy when it started operations came mostly from Wenatchee"; that "[t]hose Wenatchee transferees were intended to and did comprise a majority of the complement used by Quincy during the largest part of its annual operations"; and that "[i]t was during only two months in Quincy's first year of operations that new hires temporarily outnumbered Wenatchee transferees." *Ibid.* The ALJ acknowledged that the Quincy plant did, to some extent, reflect a "consolidation" of operations formerly performed at Wenatchee and Ferndale, but only "in the limited sense that Quincy now prime packs a few produce varieties which only Ferndale had processed in the recent past and others which only Wenatchee had processed formerly." *Id.* at 67. However, the ALJ found that these limited indicia of "consolidation" were not a sufficient basis for finding that the Quincy plant was a "new" operation privileging petitioner's refusal to recognize the Union there. *Id.* at 68.

That was so, the ALJ concluded, for two reasons. First, the Quincy plant's prime pack operation did not "significantly change[] the nature of the historical operation at Wenatchee." Quincy "merely reflects a 'replacement' and 'expansion' of Wenatchee's operation," which had been too small to "allow it to prime pack *all* of

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any job classifications that had not existed at Wenatchee, or cause any change from the basic way produce had been handled at Wenatchee (*id.* at 57); (3) petitioner "relied heavily" on former Wenatchee managers to staff the Quincy plant (*id.* at 54); (4) virtually all of the Wenatchee repack equipment, and some of its prime pack equipment, was moved to the Quincy plant (*id.* at 44, 58); and (5) although petitioner installed some new equipment and a new quality control system at the Quincy plant, these changes did not significantly alter the basic manner in which employees had been performing their jobs at Wenatchee (*id.* at 55, 60-62).

the vegetable varieties flowing in during the Northwest harvest season." Pet. App. 68 (internal quotation marks omitted). Second, the Quincy plant's prime pack operation "did not involve the merger at a new location of transferees from two formerly distinct plant complements"; rather, the group of employees who transferred to the Quincy plant was composed "almost entirely" of Wenatchee employees, and only an "insubstantial" number of that group were Ferndale employees. *Id.* at 69 & n.82. Accordingly, the ALJ concluded that there did not exist at Quincy a "real question concerning representation" requiring petitioner to abstain from recognizing any union at the Quincy plant, pending a Board election. *Id.* at 69-70, 76-77.

The ALJ rejected petitioner's contention that, even if there were substantial continuity between the Quincy plant and the Wenatchee and Ferndale plants, it had a reasonable "good faith doubt" as to the Union's majority status at the Quincy plant, and thus was justified in refusing the Union's February 1990 request for recognition, since it anticipated that, during the peak of the harvest season from August 1 to September 30, seasonal hires would temporarily outnumber the Wenatchee transferees. Pet. App. 19-20, 70-71. The ALJ concluded that the relevant date for assessing the ratio of Wenatchee transferees to new hires under *Harte & Co.* was May 25, 1990, the date on which petitioner conducted a "grand opening" ceremony at the Quincy plant, because that was the date upon which the transfer of operations to Quincy was substantially completed. And, the ALJ found, on May 25, the Wenatchee transferees constituted a majority of the Quincy workforce. *Id.* at 45, 47, 72.

The ALJ further explained that, while the Board "prefers to run representation elections in 'seasonal' industries at or near the peak of the season, so as to enfranchise the largest number of employees" (Pet. App. 73), that general policy does not apply to a situation where, as here, the seasonal hires "are not likely to be around at next year's seasonal peak." *Id.* at 75. The ALJ added that the Board has never presumed that such seasonal employees "do *not* wish to enjoy collective representation, or the fruits of collective activity harvested by their fellow workers at an earlier point." *Id.* at 73 (internal quotation marks omitted).

To remedy petitioner's unfair labor practices, the ALJ ordered it, *inter alia*, immediately to recognize and bargain with the Union as the bargaining representative of all employees at the Quincy plant, to rescind any changes in terms and conditions of employment unilaterally imposed upon the Quincy employees, and to make those employees whole for any losses they may have suffered as a result of those unilateral changes. Pet. App. 80-81.

b. The Board affirmed the ALJ's findings and conclusions, and, with a clarification not relevant here, adopted the ALJ's remedial order. Pet. App. 6-8.

3. The court of appeals enforced the Board's order in an unpublished opinion. Pet. App. 1-5. The court found that substantial evidence supported the Board's finding that there was "continuity of enterprise between the Wenatchee and Quincy plants." *Id.* at 4. The court observed that "[t]he year-round Quincy employee complement is not significantly larger than that maintained at Wenatchee, former Wenatchee employees perform the same jobs under the same supervision at Quincy as they had at Wenatchee, the Quincy plant is only 30 miles from

Wenatchee, and the addition of certain varieties of produce at Quincy neither changed job duties and classifications nor altered the nature of [petitioner's] operations." *Ibid.* While the court disagreed with the Board's selection of May 25, 1990 as the relevant date for assessing the ratio of Wenatchee transferees to new hires at the Quincy plant, the court found that, "[e]ven in late August 1990 * * * former Wenatchee employees constituted at least 40 percent, or a substantial percentage, of the Quincy employee complement." *Id.* at 5.

ARGUMENT

As the court of appeals recognized, a change in the locus of an employer's operations does not necessarily eliminate the employer's obligation under Section 8(a)(5) of the Act to recognize and bargain with the union representing its employees. "[T]he question whether the union representing the employees at the former location should continue to represent the workers at the new location involves balancing the newly hired employees' interest in choosing whether or not to have union representation against the transferees' interest in retaining the fruits of their collective activity." *Harte & Co.*, 278 N.L.R.B. 947, 950 (1986). Thus, where there has been a change in the geographic location of the enterprise, the employer must continue to recognize the union if there is continuity in both the nature of the employer's operations and the bargaining unit. See *NLRB* v. *Marine Optical, Inc.*, 671 F.2d 11, 17 (1st Cir. 1982); *Lammert Industries* v. *NLRB*, 578 F.2d 1223, 1225 (7th Cir. 1978); *Harte & Co.*, 278 N.L.R.B. at 949. Where, on the other hand, there is a lack of such continuity—in particular, where two separate bargaining units, each represented by a different union, are merged into a single unit, effectively creating a new unit—then a

"question concerning representation" arises, and the employer must not recognize either union until the Board has determined the employees' representational desires through an election. See *Hudson Berlind Corp.*, 203 N.L.R.B. 421, 423 (1973), enforced, 494 F.2d 1200 (2d Cir.), cert. denied, 419 U.S. 897 (1974). In this case, the Board's finding that there was substantial continuity between the Quincy plant and the Wenatchee plant, and that the Ferndale plant bargaining unit had not been merged with the Wenatchee bargaining unit, was upheld by the court of appeals as supported by substantial evidence. Accordingly, further review of that issue by this Court is not warranted. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). Nor does the Board's decision raise any other issue meriting this Court's attention.

1. Petitioner contends (Pet. 11-12) that, because the Quincy plant was a "consolidation" of the Wenatchee and Ferndale plants, the Board erred in applying the "continuity of enterprise" test of *Harte & Co.*, *supra*, to determine whether petitioner was obliged under the Act to recognize the Union at the Quincy plant. According to petitioner, the Board instead should have followed *Hudson Berlind Corp.*, *supra*, and concluded that the Quincy "consolidation" raised a "question concerning representation" which should be resolved through a Board election. Pet. 13. There is no merit to petitioner's claim.

In *Hudson Berlind Corp.*, the employer acquired two facilities, the employees of each of which were represented by different unions, and merged the two operations at a third facility. 203 N.L.R.B. at 421. The Board held that the employer violated Section 8(a)(2) of the Act, 29 U.S.C. 158(a)(2), by, prior to the transfer of

any employees, recognizing the union which represented the employees at the larger of the two acquired operations as the representative of all of the employees at the third facility. 203 N.L.R.B. at 422. The Board explained that "the very circumstances of the merger raised a question concerning representation," since the employer "was faced with conflicting claims of two unions currently representing the employees to be transferred." *Id.* at 423. In those circumstances, the Board concluded, the employer was prohibited from voluntarily extending recognition to one of the two unions before a Board election had been conducted. *Ibid.*

Here, by contrast, the ALJ correctly found that no such question concerning representation had arisen at any time at the Quincy plant. Pet. App. 70. As the ALJ explained (*id.* at 69 n.83), there was "[an] absence in this case of a real 'merger' of employee complements from the two former plants," for it was "obvious" that "[petitioner] intended that employees from * * * Wenatchee * * * would fill the majority of the projected 150-200 year-round positions available at Quincy." *Id.* at 42-43. Petitioner did not consider former Ferndale employees to be "a likely source" for staffing the Quincy plant because of the large distance (210 miles) between the plants (*id.* at 41 n.46); and, in fact, former Ferndale employees comprised "only an insubstantial percentage of Quincy's new complement." *Id.* at 69 n.82.[5] Nor was the fact that Quincy prime packed some of the vegetables

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[5] As the ALJ noted, petitioner's personnel manager "hazarded a guess" that 16 former Ferndale employees "eventually * * * took jobs at Quincy." Pet. App. 41 n.46 (internal quotation marks omitted). Since the Quincy plant employed 170 to 180 year-round workers (*id.* at 31 n.36, 52), former Ferndale employees constituted, at most, less than 10% of the Quincy workforce.

that only Ferndale had previously packed sufficient to make Quincy a "new" operation. For, as the ALJ noted, "Wenatchee, too, was a prime pack plant," and "Quincy merely reflects a 'replacement' and 'expansion' of Wenatchee's operation." *Id.* at 68.

Thus, contrary to petitioner's assertion (Pet. 13), the decision below does not conflict with that of the Second Circuit in *NLRB* v. *Hudson Berlind Corp.*, 494 F.2d 1200, cert. denied, 419 U.S. 897 (1974). There, the Second Circuit simply affirmed, as supported by substantial evidence, the Board's finding that, because a question concerning representation existed as a result of the merger of bargaining units in that case, the employer violated the Act by recognizing one of the two unions involved without a Board election. 494 F.2d at 1203. Here, the Board correctly concluded that there was no merger of bargaining units, and hence no such question concerning representation existed, at the Quincy plant, and the court of appeals implicitly sustained that determination.

2. Petitioner contends (Pet. 13-15) that, even if the principles of *Harte & Co.* apply to this case, the Board, consistent with its policy respecting seasonal industries, should have assessed the ratio of former Wenatchee employees to new hires at the Quincy plant as of September 30, 1990, when the harvest season was at its peak, rather than as of May 25, 1990, the date of the Quincy plant's "grand opening." There is no merit to that factbound claim.

As the Board made clear in *Harte & Co.*, "the appropriate point in time for measuring whether a substantial percentage of the new work force is composed of transferees from the old location * * * [is] the date that the transfer process was substantially

completed." 278 N.L.R.B. at 949 (emphasis omitted). The ALJ reasonably concluded that the transfer process was substantially completed by May 25, 1990, at which time a majority of the employees at the Quincy plant were Wenatchee transferees. Pet. App. 45, 72. Although the court of appeals believed that the appropriate date for assessing the composition of the Quincy workforce was "late August," the court found that, even at that time, the Wenatchee transferees comprised a substantial percentage of the Quincy workforce. *Id.* at 5.

Nothing in the Board's policy regarding the holding of representation elections in seasonal industries required the Board to assess the composition of the Quincy workforce on petitioner's proposed date. Petitioner observes (Pet. 13-14) that "the Board has consistently held that seasonal employees who have a reasonable expectation of re-employment for the next season should be included in the unit for voting purposes." But the ALJ correctly found that principle inapposite here, because the workers whom petitioner hired for the peak of the 1990 harvest season "are not likely to be around at next year's seasonal peak." Pet. App. 75. Moreover, as the ALJ also noted, "the Board has never presumed that 'new' employees do *not* wish to enjoy collective representation, or the 'fruits of collective activity' harvested by their fellow workers at an earlier point." *Id.* at 73.

3. Petitioner finally contends (Pet. 16-20) that, even if the Board's decision in *Harte & Co.* is applicable to this case, the Board ignored the first element of the *Harte & Co.* test (whether operations at the new facility are substantially the same as those at the old facility) and instead relied solely upon the second element of that test (whether transferees from the old plant constitute a substantial percentage of the new plant employee

complement), in finding that it acted unlawfully by refusing to recognize the Union at the Quincy plant. There is no merit to that contention.

Petitioner's argument mischaracterizes the decisions of the Board and the court of appeals. Far from overlooking the question of continuity of operations, the Board specifically found that "Quincy is substantially the same from an operational standpoint as Wenatchee" (Pet. App. 70), and that, even though "Quincy now prime packs a few produce varieties which only Ferndale had processed in the recent past and others which only Wenatchee had processed formerly" (*id.* at 67), such changes at the Quincy plant did not "significantly change[] the nature of the historical operation at Wenatchee." *Id.* at 68 (internal quotation marks omitted). The court of appeals sustained the Board's findings as supported by substantial evidence. *Id.* at 4. The propriety of the court's determination raises only a factual issue that does not merit further review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. at 491.[6]

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[6] Contrary to petitioner's suggestion (Pet. 17), the Board was not required "as a matter of law" to find that the Wenatchee and Quincy plants were substantially different operations simply because the Quincy plant handled some new kinds of products. The Board decisions cited by petitioner (Pet. 17 n.2) establish no such rigid rule; moreover, as the ALJ found, "the introduction of new produce items or blends [at Quincy] was not shown to have itself created any job classifications not in existence at Wenatchee, nor any changes in the basic way prime pack and repack of a more limited range of produce varieties was handled at Wenatchee." Pet. App. 57. Furthermore, neither *American Fluorescent Corp.*, 275 N.L.R.B. 1097 (1985) (Pet. 18) nor *NLRB* v. *Massachusetts Machine & Stamping, Inc.*, 578 F.2d 15 (1st Cir. 1978), upon which petitioner relies (Pet. 19-20), supports petitioner's refusal to

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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bargain with the union, for those authorities are factually distinguishable from this case. In *American Fluorescent Corp.*, the Board, in finding the employer's refusal to bargain lawful, relied on the fact that, of the 63 employees at the new facility, only 12 were transferees from the old facility. 275 N.L.R.B. at 1097 n.1, 1099, 1102. And in *Massachusetts Machine & Stamping*, the court held that the employer had established a good-faith doubt as to the union's majority status at the new plant where, among other factors, only 11 of 22 employees working at the new plant on its first day of operations were transferees from the old facility, no further employees from the old plant had elected to transfer to the new plant, and the employer had a reasonable expectation that additional new hires would be added to the workforce at the new plant "within a very short period of time." 578 F.2d at 18-19.